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Supreme Court of the United States

OCTOBER TERM, A. D. 19[illegible]

No. [illegible]

HARRY SCHIRING,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 209.

HARRY GUNDLING,
Plaintiff in Error,

vs.

CITY OF CHICAGO,
Defendant in Error.

Statement of Facts.

This action was originally brought before a Justice of the Peace of the City of Chicago to recover a penalty upon a charge that the plaintiff in error did on or about the 31st day of December, A. D. 1897, have, keep and expose for sale and offer to sell cigarettes within the City of Chicago without having first procured a license for that purpose, in violation of an ordinance of said City of Chicago regulating the sale of cigarettes. The plaintiff in error was found guilty as charged and fined $50 and costs. An appeal was taken to the Criminal Court of Cook County, Illinois, where, on March 5, 1898, the case was tried *de novo*, resulting in the same judgment as that obtained in the magistrate's court. Upon appeal this judgment was affirmed by the Supreme Court of the State of Illinois, whereupon the

plaintiff in error sued out a writ of error in this court directed to the Supreme Court of the State of Illinois.

The ordinance, pursuant to the provisions of which the plaintiff in error was prosecuted, was enacted by the Common Council of Chicago March 1st, 1897, and is in full as follows:

> "*Be it ordained by the City Council of the City of Chicago:*
>
> "SECTION 1. The Mayor of the City of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the City of Chicago, in the manner following, and not otherwise.
>
> "Any person, firm or corporation desiring a license to sell cigarettes shall make written application for that purpose to the Commissioner of Health in which shall be described the location at which such sales are proposed to be made. Said application shall be accompanied by evidence that the applicant, if a single individual, all the members of the firm if a co-partnership, and person or persons in charge of the business, if a corporation, is or are persons of good character and reputation. The Commissioner of Health shall thereupon submit to the Mayor the said application with the evidence aforesaid, with his opinion as to the propriety of granting such license and if the Mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes he shall issue a license in accordance with such application, upon such applicant filing a bond payable to the City of Chicago, with at least two sureties to be approved by the Mayor in the sum of $500, conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the City of Chicago, now in force or which may hereafter be passed, with reference to cigarettes; provided, however, that nothing herein contained shall be held to authorize the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine or sugar.
>
> "SECTION 2. Every person, on compliance with

the aforesaid requirements and the payment in advance to the City Collector, at the rate of $100 per annum, shall receive a license under the corporate seal, signed by the Mayor, and countersigned by the Clerk, which shall authorize the person, firm or corporation therein named to expose for sale, sell or offer for sale cigarettes at the place designated in the license, provided, that no license shall be granted to sell within 200 feet of a school house.

"SECTION 3. Every license so granted shall be at the rate of $100 per annum. The municipal year shall begin May 1st, 1897, and on May 1st of every subsequent year during the continuance of this ordinance. Provided, however, that in no case shall the license extend beyond the municipal year. Such license may be issued for the unexpired portion of a municipal year, upon the payment in advance at the rate fixed by the ordinance and proof furnished by the Commissioner of Health to the City Collector, that the applicant was not liable for license nor were any cigarettes sold at the place of business without a license, prior to date fixed in the application.

"SECTION 4. Any license so granted may be revoked upon written notice by the Mayor whenever it shall appear to his satisfaction that the party so licensed shall have violated any provisions of the Laws of the State of Illinois or of any ordinance of the City of Chicago relating to cigarettes, or any condition of the bond aforesaid.

"SECTION 5. Any and all persons licensed under this ordinance or any ordinance for the sale of cigarettes shall immediately cause to be and remain posted upon some conspicuous part of the room or place where cigarettes are sold or exposed for sale, his or their license.

"SECTION 6. Any person so licensed who shall not cause such license to be and keep the same posted as required by the preceding section, or who not being licensed shall cause or permit any paper or document purporting to be a license to be or remain posted as aforesaid, shall on conviction be fined a sum of not exceeding One hundred dollars.

"SECTION 7. It shall be the duty of the Commis-

sioner of Health, and he is hereby authorized and empowered from time to time to inspect and examine all places where cigarettes are licensed to be sold within the City of Chicago with a view of ascertaining whether the laws of the State of Illinois and the ordinance of the City in relation to the sale of cigarettes are being complied with at such place and it shall be his duty to cause all such laws and ordinances to be rigorously inforced; and it shall be the duty of all persons, firms or corporations licensed to sell cigarettes within the City of Chicago upon demand of the Commissioner of Health, to furnish to said Commissioner for his inspection samples of all cigarettes sold or offered for sale by them, which samples of cigarettes shall be analyzed by or under the direction of said Commissioner of Health and a record of such analysis shall be made and kept in his office for the inspection of the public.

"SECTION 8. Any person who shall hereafter have or keep for sale or expose for sale or offer to sell any cigarettes at any place within the City of Chicago without having first procured the license as above provided, shall be fined not less than Fifty dollars and not exceeding Two Hundred dollars for every violation of this ordinance and a further penalty of $25 for each and every day the person, firm or corporation persists in such violation after a conviction for the first offense.

"SECTION 9. This ordinance shall be in force from and after its passage and due publication." (Record, 8, 9, 10.)

The case was tried upon an agreed statement of facts (Record, page 8), setting out, in substance, that the City of Chicago was and is a municipal corporation, organized and existing under the general act relating to the incorporation of cities and villages; that the foregoing ordinance was enacted on March 1st, 1897, and has not been repealed, and that the plaintiff in error did, on or about the 31st day of December, A. D. 1897, have, keep and expose for sale and

offer to sell cigarettes, within the City of Chicago, without having first procured a license for that purpose.

The plaintiff in error contended that he was not guilty, for the reason that the aforesaid ordinance was null and void, and asked the Criminal Court to hold each and all of the following propositions of law as the law of this case (Record, page 11):

I.

That the Common Council of the City of Chicago had and has no power to enact the ordinance pursuant to the provisions of which this prosecution is based.

II.

That the ordinance of the City of Chicago upon which the defendant is prosecuted in this case is illegal and void.

III.

That the ordinance of the City of Chicago upon which the defendant is prosecuted is illegal and void, depriving persons of liberty and property without due process of law, in violation of the constitution of the United States of America and the State of Illinois.

IV.

That the ordinance of the City of Chicago upon which the prosecution of the defendant is based is in contravention of that provision of the constitution of the United States which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and is therefore illegal and void.

V.

That the defendant is not guilty.

This the Criminal Court refused to do and upon appeal the appellant properly assigned error thereon as well as upon the other exceptions reserved in the record. (Record, page 12.)

It was contended in the state courts that the general act of the State of Illinois under which the City of Chicago is incorporated did not grant to the city the power to license or regulate the sale of cigarettes, and that, therefore, the ordinance was illegal and void. In this contention the plaintiff in error was not sustained by the Supreme Court, but, on the other hand, it was decided that the general incorporation act authorized the city to impose the license. *Gundling* v. *Chicago*, 176 Ill., 340. This decision by the state court as to this point is final and is not subject to review by this court. The ordinance, however, was questioned upon the other grounds alleged in the assignments of error and the decision upon those was rendered adverse to the plaintiff in error.

Our contentions in this court are narrowed to the questions: First, as to whether the state itself, acting through the Common Council of the City of Chicago, is not inhibited by the Federal Constitution from making those provisions in the ordinance which delegates to the Mayor the entire subject of granting and revoking licenses to persons engaged in the business of selling cigarettes; second, as to whether the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee of $100, a sum manifestly greater than the expense of issuing the license and providing for the regulation, thereby depriving persons of their liberty and property by an interference with their rights which is

neither necessary to the protection of others nor the public health.

The Supreme Court of Illinois in its opinion did not challenge the well-recognized principle that a power requiring the exercise of a discretion judicial in its nature cannot be delegated by a body to whom it is committed by the supreme authority, but evaded the result of that principle by assuming that there was no delegation to the Mayor of the power of the City Council. Their position is sustained by neither precedent nor authoritty, as the delegation in the ordinance in question is in its simplest form. Section 1 of the ordinance provides that the "Mayor of the City of Chicago shall from time to time grant licenses authorizing the sale of cigarettes within the City of Chicago," and that "if the Mayor shall be satisfied that the persons" applying for a license "are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license . . . upon such applicant filing a bond payable to the City of Chicago with at least two sureties approved by the Mayor in the sum of five hundred dollars ($500) conditioned that the licensed person, firm or corporation shall faithfully observe and obey all laws of the State of Illinois and ordinances of the City of Chicago now in force or which may hereafter be passed with reference to cigarettes." Section 4 provides that any "license so granted may be revoked upon written notice by the Mayor whenever it shall appear to his satisfaction that the party so licensed shall have violated any provisions of the laws of the State of Illinois or of any ordinances of the City of Chicago relating to cigarettes or any conditions of the bond aforesaid," thus giving the Mayor the power to convict a licensee of a misdemeanor under the statutes of the State of Illinois relating to the sale of cigarettes (Revised Statutes of the State of Illinois, Chap. 38, Sec. 207, *h*, *i*),

and of violating the provision of the ordinance requiring the license to remain posted upon some conspicuous part of the room or place where the cigarettes are sold, for which a fine not exceeding $100 is imposed (Sections 5 and 6) without a trial by jury, without a right to appeal, and with no remedy against the Mayor for unjust or arbitrary exercise of the powers conferred by the ordinance.

Thus the whole subject of granting or revoking licenses of cigarette dealers is committed to the arbitrary and final discretion of the Mayor. Hence we contend that the plaintiff in error is restrained of his liberty and divested of his property without due process of law in direct contravention to the constitution of the United States and in direct conflict with the immemorial usages and practices of the people of Illinois; that the plaintiff in error is denied equal protection of the law in this, that in other businesses where licenses are granted, as for example the liquor business, the policy has been strictly enforced not to allow such a delegation. One tradesman or craftsman is not to be singled out and subjected to the absolute supervision of an irresponsible magistrate while his neighbor is protected in his right by the customary safeguards of the law.

And further, that even had the council the power to license and regulate the sale of cigarettes, the ordinance, by prescribing a fee of $100 as a condition precedent to that right, unjustly deprives the plaintiff in error of his liberty and property in a business which he has a natural right to follow and in a manner which is unnecessary and unreasonable to foster the general welfare of the community.

Or in other words, the ordinance is void; first, because it vests arbitrary discretionary power in the Mayor; and second, because its provisions are beyond any reasonable necessities of police regulation.

These points are presented by the second and third assignments of error (Record, 23), which are as follows:

> "2. That the court below erred in holding that the ordinance set out in the record was an authorized exercise of municipal power and that the defendant could therefore rightfully be prosecuted thereunder for a violation of its provisions, and that such prosecution and conviction did not deprive the plaintiff in error, as claimed by him in the trial court and in the Supreme Court of the State of Illinois, of rights guaranteed to him under the constitution of the United States and the fourteenth amendment thereof.
>
> "3. That the court below erred in holding that the ordinance set out in the record was not unconstitutional under the fourteenth amendment of the Constitution of the United States, which provides that: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

BRIEF.

I.

The ordinance vests arbitrary and discretionary authority in the Mayor, and is therefore void.

The ordinance in express words provides that "the *Mayor* of Chicago shall from time to time *grant* licenses authorizing the sale of cigarettes within the city of Chicago" (Record, page 8); that "*If the Mayor shall be satisfied* that the persons applying for license are of good character and reputation and *are suitable persons to be entrusted with the sale of cigarettes* he shall *issue* the license upon the applicant filing a bond conditioned that he" (the licensee) "shall faithfully observe and obey all the laws of the State of Illinois and ordinances of the City of Chicago . . . with reference to cigarettes." (Record, page 9.)

Section 4 provides that "any license so granted may be revoked upon written notice *by the Mayor* whenever it shall appear *to his satisfaction* that the party so licensed shall have violated any provisions of the laws of Illinois, or of any ordinance of the City of Chicago relating to cigarettes, or any conditions of the bond aforesaid."

The majority of the judges of the Supreme Court of Illinois held that the subject of *granting licenses* for the sale of cigarettes is not delegated by the ordinance, but that the City Council really grants while the *Mayor merely issues the license.* (176 Ill., 340, 350.)

The opinion, however, carefully avoids any statement of the terms of the ordinance as above referred to, and merely states that "the ordinance by its terms fixes the rate per annum to be charged for a license," and then says: "In this there is no delegation to the Mayor."

The court overlooked the provision of the ordinance investing the Mayor with authority to hear and determine the qualification of the person, the desirability of the location of sale, and the propriety of granting the license. It must have forgotten that the Mayor is invested with authority to revoke a license: *First,* if the licensee shall have violated any of the laws of Illinois relating to cigarettes;* *second,* if he shall have violated any ordinance of the City of Chicago in reference to cigarettes; and, *third,* if he shall have violated any condition of the bond aforesaid. This is no mere discretion to prefer charges and make preliminary findings which shall be reviewed by the Council, or to institute a prosecution which may ultimately find its way into a court. The Mayor, and he alone, decides the question as to how long the license is to be held by the licensee. His decision is final and is not reviewable by the courts. The right and privilege of pursuing the usual avocation of the dealer depends upon the state of mind of the Mayor, with no safeguard or immunity for the abuse of the power. He may revoke the license upon such evidence as satisfies him, so that the granting of the license as well as the continuation of the business depends entirely upon the decision and discretion of the Mayor without any provision for appeal or consultation with the common council of the City of Chicago. The Mayor is the Alpha and Omega. With him and upon his discretion rests the right of the individual to continue his business.

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* This court takes judicial notice of "an act to prohibit selling, giving or furnishing tobacco in any of its forms to minors, an providing a penalty therefor," which provides "that hereafter no person or persons in this state shall sell, buy for, or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor under sixteen years of age, unless upon the written order of parent or guardian," under penalty of twenty dollars fine for each and every offense.

R. S. 1897, Chap. 38, Sec. 207 h, 207 i.

The case of *East St. Louis* v. *Wehrung*, 50 Ill., 28, hereafter referred to and quoted, establishes our contention that the powers conferred upon the Mayor are illegally delegated.

This case was followed by Mr. Justice Breese in *Kinmundy* v. *Mahan*, 72 Ill., 462, and Mr. Justice Baker in *Chicago* v. *Trotter*, 136 Ill., 430, declared the principle.

See, also:

Carr v. *People*, 166 Ill., 126.

Bradford v. *Pontiac*, 165 Ill., 612.

In the case of *Cairo* v. *Coleman*, 53 Ill. App., 680, the court, in holding that an ordinance providing for the inspection of merchandise and making the city marshal the inspector by virtue of his office, and providing that if, upon inspection, he discovers in such stock any articles, the sale of which shall be injurious to the health or public welfare of the citizens, or a fraud upon the public, such articles shall be reported by him to the city clerk as not having passed inspection, is void for the reason that it delegates to the city marshal the power to determine what articles of merchandise, if sold, will be injurious to the health or public welfare of the citizens or a fraud upon the public, said:

> "There would be no stability in such a regulation. Citizens engaged in legitimate business would be subject to the whims and caprice of each city marshal. The best and most intelligent of men frequently differ on such subjects. The determination of one city marshal as to what was injurious would be no criterion for the determination of another. If the power existed to inspect all merchandise, merchants would have the right to know by fixed law what was placed under the ban of official power. Any other course would be oppressive and intolerable. In such case, the power to determine what was injurious would rest in the council and not its agents."

In the case of *In re Elliott,* 11 Manitoba, 358, the following is found in the opinion:

> "The inspection of dairies, etc., is purely ministerial work, and may, of course, be performed by the officials employed by the council for that purpose. But this section hands over to the health officer a duty that is more than ministerial. It authorizes him to direct the issue of a license without any report of the result of the inspection, or any further reference to the council; and an official is thus enabled arbitrarily to decide whether an applicant is to receive a license or not. This, it seems to me, is a delegation of authority that cannot be justified; for the council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself. It is manifest that such a delegation of authority might result in injustice and hardship; and I think that this provision of the section must be held to be illegal. *Reg* v. *Webster,* 16 O. R., 187; *Hitchcock* v. *Galveston,* 96 U. S. R., 341."

Counsel endeavored to distinguish these cases, and especially the Illinois cases. The cases cited in support of their contention were those construing ordinances, none of which give to the Mayor a discretion. In none of them is there found the statement that "if the Mayor shall be satisfied that the persons . . . are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license." They all provide merely that he shall determine whether or not certain prerequisite conditions have been complied with. He has no discretion, but is to perform a ministerial function. But in the case at bar, the Mayor may think a person unsuitable to be entrusted with the sale of cigarettes without regard to his character or reputation, and in his discretion deny the license. He may use his discretion as a political weapon or to gratify his animosities or preju-

dices. He may revoke the license for the same reason and with impunity because there is no legal remedy. The Mayor may determine the condition upon which the license may be issued and upon which it may be refused. Such delegation is within the inhibition of the provisions of the Fourteenth Amendment to the Federal Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction equal protection of the laws."

Among the privileges and immunities of citizens of the United States which, perhaps, are embraced in the broader word liberty, is the protection against the arbitrary exercise of public authority, the leaving to uncontrolled, arbitrary, unreviewable discretion of one man the rights of another, except in so far as express provisions of the constitution, or immemorial usage, or what is called the common law, sanctions the control by public officers of the business and affairs of private individuals, or the use of public places by individuals.

The first fundamental principle of the constitution is the equality of the citizens; the second that no power is to be exercised but by delegation according to the course of the constitution construed in the light of the common law.

> "The liberty mentioned in the Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties: to be free to use them in all lawful ways: to live and work where he will: to earn his livelihood by any lawful calling: to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his

carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights: that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty: for it takes from him the freedom of adopting and following the pursuit which he prefers: which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment."

Allgeyer v. *Louisiana*, 165 U. S., 578, 589.

What restrictions have been sanctioned upon the freedom of individuals to conduct their lawful callings?

We must all admit that the unrestrained freedom of the individual is not that which is termed civil liberty, but that each man's will and whim must in some measure yield to the general good, but that no man's right shall be held on the frail tenure of another man's whim or will, and that the general good is in nothing more concerned than in pro-

tecting the individual in his enjoyment of life, liberty and property.

Orient Ins. Co. v.*Dagge*, 172 U. S., 557.

Wyneheimer v. *Peo*, 13 N. Y., 378, quoting 1 Blk. Com., 139.

"In *Loan Association* v. *Topeka*, 20 Wall., 655, 663, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the state, and that a government by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said: 'The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Chicago, Burlington, etc., R'd. v. *Chicago*, 166 U. S., 226-37.

The underlying principle of our local municipal government is the administration of local affairs, except in a few well-understood instances, by a common council, chosen by the people of the locality. To such a common council immemorial usage permits the delegation by the general assembly of much of the legislative power which the legislature might itself exercise.

We said, except in a few well-understood instances, and we desire to direct attention to the fact that the practice of delegating which is now universally followed was originally regarded as an exception to the general rule of non-delegation.

Immemorial custom and usage in England and America have sanctioned the delegation of a broad discretion in special boards in relation to the imposition and collection of the revenue, and likewise in reference to the supervision of the highways in towns, the streets, the public parks and commons in more populated districts.

The public or common places are the property of the public, and these constitute well-established exceptions to the general principle we are invoking, but these exceptions do not impinge or touch the rights involved in the present contention. The one relates to the property rights of the people, the other to the property of the individual.

So long have the habits and customs of the people in regard to the matters above referred to been established that it is frequently spoken of as a part of due process of law, or as of common right, or as according to common law.

In incorporated cities this common council or legislative body is the body on whose discretion the general assembly of the state and the body of the people of the local community rely for a faithful and wise administration of their affairs.

That we are not attaching too much importance to immemorial usage as one of the criteria of due process of law, and also that delegation where sanctioned is an exception to the general rule, is abundantly supported by authority.

In a California case where the power to delegate was denied an argument was advanced that the legislature was constantly delegating legislative authority to township and municipal officers. To this argument the court replied as follows:

> "In the third place, it is said that the legislative power is delegated to counties, towns, cities, and villages. But these instances of local legislatures are referred to by the same authors and judges, who have

> maintained as a fundamental maxim, that the power to make laws cannot be delegated by the State Legislature. A system of local governments and municipal corporations existed in England from the earliest times, was adopted by the first settlers in America, and has never been supplanted. Some such system seems to have entered into every plan of free government entertained by our countrymen; and it is very properly assumed that such a system was in contemplation by those who framed the constitutions of the several states. 'The right of the Legislature, in the entire absence of authorization, or prohibition, to create towns or other inferior municipal corporations, and especially of local taxation and police regulation *usual with such corporations,* has always passed unchallenged The Legislature, in these cases, is not regarded as delegating its authority, because the regulation of such local affairs as *are commonly left to local boards* and officers is not understood to belong properly to the State.' Cooley Const. Lim. 189-190."
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> *Houghton* v. *Austin,* 47 Cal., 644-55.

And Judge Cooley says, speaking of the maxim that the legislative power must not be delegated:

> " We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that the legislative power must not be delegated, *since that maxim is to be understood in the light of the immemorial practice of this country and of England,* which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority."

And as was recently said in the opinion of the Court of Appeals of the State of New York, *Rathbone* v. *Wirth*, 150 N. Y., 459:

> " What has been frequently called the political ten-

> dency of the constitution is not always to be found expressed in words, but is to be derived from acknowledged principles of government that existed long before its adoption, and are to be implied from the general language and evident purpose and scope of particular provisions."

This principle was emphatically affirmed and strictly enforced in

People v. *Hurlbut*, 24 Mich., 44.

People v. *Albertson*, 55 N. Y., 387.

The State of Connecticut for many years had no written constitution, but no one ever suggested that its people were without the protection of the great constitutional guaranties of the common law, and it has been several times held by this court that the constitution of Connecticut was the customs of the common law and the customs of the people which have arisen since the settlement of the state.

Calder v. *Bull*, 3 Dallas, 386.

Livingston v. *Moore*, 7 Peters, 469.

But we have authority higher than even the expression of the jurists above quoted. This court has enforced the principle we are contending for. In the case of *Den* v. *Hoboken Land and Improvement Co.*, 18 How., 272, inquiring into what is due process of law, the court said:

> "The article is a restraint on the legislative as well as on the executive and *judicial powers* of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles then, are we to resort to ascertain whether this process, enacted by Congress is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the

> emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

In this case they upheld summary process in a revenue case upon the ground that it accorded with immemorial usage of the English people.

The court below has inaugurated a change of policy in regard to a matter of common right.

A change in the policy inaugurated by the general legislature or any department of government, except a constitutional convention, substituting the whim or discretion of a single individual *abridges* the *privileges and immunities* of the citizen, and when by such a change the usual avocation, calling or business of the individual can be interrupted or suspended by the written notice of an individual, whether he be a Mayor or a police officer, the individual thus disturbed is deprived of his property and of his liberty without due process of law.

In no state in the Union has the policy above indicated been more thoroughly established and consistently practiced than in the State of Illinois.

Many years ago, Mr. Justice Walker announced the time-honored principles, as follows:

> "As a general rule, where power is conferred upon a municipal corporation to regulate any calling or business, they are powerless to delegate a discretionary authority to others, or to an individual. In creating such bodies, it is designed to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that cannot be so readily guarded against by the general laws of the State. And in conferring the power upon the corporate body, it is with the intention that it shall be exercised by the body created, and in the mode prescribed, and any de-

parture from such authority, or *any attempt by the body to transfer their powers to others is unwarranted.*

" The 44th section of Article III of the City charter (Private Laws, 1865, p. 349) declares that the city council shall have power to 'restrain, prohibit and suppress tippling houses, dram-shops, gaming, bawdy, and other disorderly houses.' *This provision manifestly intended that the power should be exercised by the city council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or* to fix the amount which should be paid for a license If the treasurer may, under this ordinance, refuse license with the concurrence of the mayor, then they, and not the city council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion fix the sum to be paid, then he, and not the city council would discharge the duty.

" In the proper exercise of this power, the city council should adopt general ordinances, prescribing a general rule by which licenses might be obtained. They might, no doubt, prescribe the character of persons who might or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant such licenses. The ordinances should prescribe the amount required to be paid for each license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinances should be of that general character that all persons coming within its requirements should be entitled by complying with its provision to receive a license. And the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the City." *The City of East St. Louis* v. *Wehrung*, 50 Ill., 28-31.

We do not understand that the Supreme Court has intended or professed to adopt a new policy, but is professing not to violate the principle of the delegation of a power legislative and judicial in its nature.

There is no conflict of authority upon what constitutes judicial discretion as distinguished from ministerial duty in so far as the same is involved in such cases. *Mississippi* v. *Johnson*, 4 Wall., 475.

In the case of *Darst* v. *People*, 51 Ill., 286, the town of Eureka adopted an ordinance declaring all intoxicating liquors kept for sale or to be given away a nuisance and directed that the police officers abate such nuisance by removing such liquors beyond the limits.

The police officers removed the liquor belonging to Darst beyond the limits of the town, but did not destroy it.

The Supreme Court in that case said:

> "The board of trustees of Eureka had no more power to authorize their police officers to perform acts of this character, than they had to authorize them at discretion to assess a fine of fifty dollars upon any man whom they might believe to keep spirits for sale, and seize his property or person for its payment, without inquiry before a court, or an opportunity of being heard in his own defense. *Such proceedings are a violation of the elementary principles of our constitution and laws, and it is unnecessary to enlarge upon this topic.*
>
> "A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine."

In this case it is left entirely for the Mayor to say whether or not one holding a license has been guilty of violating the state law, or city ordinance, in reference to the sale of cigarettes.

To hear evidence and adjudge a penalty or forfeiture is purely a judicial power.

Poppen v. *Holmes*, 44 Ill., 360.

Darst v *People*, 51 Ill., 286.

Flint P. R. Co. v. *Woodhill*, 25 Mich., 100.

A ministerial act is one performed in a prescribed manner in obdience to the mandate of legal authority, without regard to the exercise of judgment as to the propriety of the act on the part of the party performing.

Waldo v. *Wallace*, 12 Ind., 572.

The appellant is denied the equal protection of the laws in this: The liquor dealer (and in fact the owner of any other business) is protected in his right by the time-honored principle that his rights are governed by the common council, while the cigarette dealer is left to the summary discretion of the Mayor. We have cited the decisions showing the sancity of the right of the liqour dealer and entertain the hope that our client may have the equal protection of the same principles of law.

The cigarette may not be as ancient, surely it is not so venerable, and evidently it is not in equal favor in the eye of the tribunal to which the writ of error in this case is directed, but it is recognized as a legal business and a legitimate form of vending tobacco (*Sawrie* v. *Tenn.*, 82 Fed. Rep., 615), and no argument is required that it is not entitled to the equal protection of the law.

The general principle, alike fundamental and considered by the American people an essential to the preservation of their rights and liberties, is that unlimited power and authority must not be placed in any hands without ample provision being made for control and revision, in order that the immunity of the citizen against unjust and oppressive action shall be rendered as certain as possible.

The specific rule deduced from these general principles which have become axioms of American constitutional law governing such cases is that the local legislative assembly cannot delegate to another individual, board or tribunal the exercise of what is termed judicial discretion, *i. e.*, a discretion which requires the weighing and balancing of evi-

dence and a judgment upon the character or qualification of individuals, or whether one has been guilty of violating a law or has incurred a penalty or forfeiture, but that mere ministerial duties which leave no discretion in the performance, provided certain preliminary conditions are complied with, may be so delegated.

In the present case under no condition prescribed is the Mayor obliged to issue the license. Under no condition pointed out in the ordinance would a mandamus lie, that writ being appropriate only to compel the performance of ministerial acts.

Yick Wo v. *Hopkins*, 118 U. S., 356.

It remains only to distinguish from this case certain cases where authority is sometimes given to town or city officers. The most notable is the power of supervising and regulating the use of commons, parks, streets and highways. This is distinguished upon two grounds:

First. The right to enjoy these is not a property right similar in class to the right to conduct a business.

Second. From time immemorial large powers have been given to town officers and highway supervisors over the use of the streets, the necessities of the case not permitting the slow process in the court.

In every such case the proprietary right of the state has been remarked upon as a ground of decision and particularly so in *Davis* v. *Massachusetts*, 167 U. S., 43.

II.

The ordinance is void because its provisions are beyond any reasonable necessity of police regulations.

> "The fact that a license is required to do an act is of itself a prohibition of such act without a license."
>
> *Chilvers* v. *The People*, 11 Mich., 49.
>
> *Sherman* v. *Ft. Wayne*, 127 Ind., 109.
>
> "A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this right to labor or employ labor, make contracts in respect thereto, upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitute the essential distinction between freedom and slavery, between liberty and oppression."
>
> *State* v. *Goodwill*, 33 W. Va., 179.
>
> "The right to pursue the ordinary callings of life exists independently of government, and the pursuit of them can only be so far restrained and regulated as such restraint and regulating may be required to prevent the doing of damage to the public or to third persons."
>
> Tiedeman's Limitations of Police Power, 273.

The sum charged for a license under the ordinance in question is altogether unreasonable and wholly beyond the requirements necessary to carry out the regulations provided by the ordinance. It cost but a few cents to issue a license. The ordinance does not provide any salutary regulations directed to the general welfare of the community. Section 7 makes it the duty of the Commissioner of Health from time to time to inspect and examine all

places where cigarettes are licensed to be sold within the City of Chicago with a view of ascertaining whether the laws of the State of Illinois and the ordinance of the City of Chicago, in relation to the sale of cigarettes, are being complied with at such places. In other words, it does not make it his duty to examine or inspect all cigarettes with a view of ascertaining whether or not they are pure, or whether an attempt to defraud the public is being made, for the ordinance in no sense comes within the range of an inspection ordinance.

> "What laws may be properly classed as inspection laws must be determined largely by the nature of the inspection laws of the states at the time the constitution was framed." *People* v. *Compagnie Generale Transatlantique*, 107 U. S., 59, 67.
>
> 23 Amer. & Eng. Encyc. of Law, 311 *et seq.*

An investigation into the inspection laws of the State of Illinois will show that never in its history has a license been imposed as a means of, or as incidental to, carrying out the intention of these laws.

Reference is here had to "An Act to establish inspection within the State," approved March 23, 1819 (Session Laws 1819, page 199); "An Act establishing and regulating the inspection of tobacco in this State," in force January 12, 1829 (laws of 1833, page 339); Revised Statutes of 1845, page 286; and the present laws now in force respecting the inspection of oil and grain. These laws are in accord with *Turner* v. *Maryland*, 107 U. S., 55, where it is said:

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, mode of putting up, and marking and branding of various kinds, all of these matters being supervised by a public officer having authority to pass or not to pass the article as a lawful merchandise, as it did or did not answer the prescribed requirements."

There is not a single instance since the adoption of the federal constitution or at any time reported in all the books in which a license has been imposed either by a state or municipality as a means of regulating the inspection of an article, and is it in any sense appropriate to the exercise of the power of inspection? A license to sell cigarettes does not in the least facilitate the inspection of them. It is easy to see that the power to regulate the sale of an article implies the power to license, in order that should the seller violate the law, and show himself unfit to sell the article, his license may be revoked. But inspection laws have no reference to the person; they affect the thing. The ordinance makes it the duty of the Commissioner of Health merely to examine the places where cigarettes are sold with a view of ascertaining whether or not the licensee has caused his license to be posted upon some conspicuous part of the place where the cigarettes are sold; or to ascertain whether or not, under the Criminal Statutes of the State of Illinois, cigarettes are being sold by the licensee to minors, or to learn whether or not the person selling the cigarettes has obtained a license for that purpose. He may also in his discretion demand samples of cigarettes for inspection, but it is not made incumbent upon him to make such demand, and he may do it once a week, or once a month, or once a year, or never. In a great city like Chicago, where there are over 4,000 persons engaged in the sale of cigarettes, it is frivolous to assume that $100 is a reasonable fee. If every dealer of cigarettes in Chicago should take out a license the city would receive over $400,000, which is a sum so exorbitant to carry out the regulations of the ordinance as to justify the assumption that the members of the common council fully realized at the time of the passage of the ordinance that the cigarette busi-

ness of this country was mostly in the hands of large tobacco corporations which controlled vast wealth.

Tiedeman's Limitations of Police Power, 274, lays down the following principle:

> " In the regulation of all such occupations it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expenses of issuing the license and maintaining the police provision; that is, a reasonable sum must be determined by the facts of each case, but where it is a plain case of police regulation the courts are not inclined to be too exact in determining the expense of procuring the license as long as the sum demanded is not altogether unreasonable."

Cooley's Constitutional Limitations, 744.

Tiedeman's Limitations of Police Power, 294.

Van Gant v. *Harlem Stage Co.*, 59 Md., 330.

State v. *Hoboken*, 41 N. J. Law, 71.

City v. *Boatmen's Ins. and Trust Co.*, 47 Mo., 150.

It is neither necessary to the protection of, or conducive to, the public health or welfare to restrain the business of selling cigarettes The selling of cigarettes creates no disagreeable odors in the neighborhood in which they are sold, nor in any way detracts from the happiness or comfort of persons residing in the neighborhood. *In re* Jacobs, 98 N. Y., 98. While it is true that the excessive use of cigarettes may be injurious, yet that is not enough to justify such an unreasonable ordinance as the one in question. Tiedeman says, p. 294 of his work on limitation of police power, that:

> " It is not enough that a thing may become harmful when put to improper use; it must be itself harmful and incapable of a harmless use. Poisonous drugs are valuable when properly used, but they may work serious injury by being improperly used even to the extent of destroying life. Safeguards of every kind

> can be thrown around the use of them so that damage may not be sustained by the improper use of them, but that is the limit of the police control of the trade."

The only substantial requirements of the ordinance as far as the regulation of the sale of cigarettes is concerned are such requirements as will insure the collection of the license fee, to wit, the examination of the places where cigarettes are sold to see if the license is duly posted in a conspicuous place. Such requirements are not police in their nature, but come properly under the head of taxation. Tobacco used in a moderate degree is found a valuable and useful stimulant, and should not be made the subject of unreasonable and unjust requirements. Nor should the thousands of merchants in the outlying dstricts, where the sale of cigarettes is limited, be deprived of the right to sell the same on account of a prohibitive license fee.

Respectfully submitted,

CHARLES H. ALDRICH,
LEE D. MATHIAS,
Attorneys for Plaintiff in Error.